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IN THE

Supreme Court of the United States

October Term, 1966

Number 670

JOHN LESTER ELLENBURG AND
BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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Now comes JOHN LESTER ELLENBURG and BEN EDELSTEIN, Petitioners in Certiorari, and petitions this Honorable Court for the writ of certiorari to the Court of Appeals of the State of Georgia.

OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported unofficially in 148 S.E. Reporter, 2nd, p. ____. The opinion of the Court of Appeals is appended hereto.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on April 18, 1966, and a timely motion for rehearing filed April 25, 1966 was denied May 4, 1966. A petition for certiorari was filed in the Supreme Court of Georgia on May 31, 1966 and denied by that Court without opinion on July 11, 1966, and a motion for reconsideration was denied by the Georgia Supreme Court on July 21, 1966.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1257 (3), giving this Court jurisdiction to grant certiorari to the final judgments of the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the admission into evidence of an affidavit for search warrant and search warrant issued by a state court judge without statutory authority, in a criminal case and over objection of defendant, violate the 4th and 14th Amendments to the United States Constitution?

2. Where a search warrant authorizes a search for "records, money, and other bookmaking paraphernalia" described in an attached affidavit, and the referred to affidavit merely describes them as "records of bets, names or symbols of bettors, amounts bet, amounts of money 'laid off' with other professional bookmakers, financial records showing the status of said bookmaking business and showing the amount of money owed to winning bettors and the amount of money to be collected from losing bettors, large quantities of 'flash paper' being inflam-

mable paper which can be instantly ignited so as to destroy any records of the commission of said offense, and large sums of money representing wagers collected from bettors on said professional and college football games," does the warrant sufficiently comply with the 4th Amendment to the United States Constitution forbidding any warrant to issue that does not "particularly describe" the article or things to be seized, and thus offend the "due process" clause of the 14th Amendment when used as the basis for the admissibility of evidence seized from a defendant in a State criminal case?

3. When a State judge issues a search warrant, and finds "sufficient cause" in the warrant, but makes no determination or finding of "probable cause" as required by the Fourth Amendment, is the warrant sufficient to authorize a search under the Fourth and Fourteenth Amendments to the United States Constitution?

4. Is a record identified as a line sheet and found in the physical possession of a defendant at the time of the execution of a search, admissible in evidence over objection that the search warrant does not particularly describe such document or authorize its seizure, and does its admission into evidence offend the Fourth and Fourteenth Amendments to the United States Constitution?

5. Where the only facts tending to establish the grounds for the issuance of a search warrant consist of (1) information of an undisclosed informer, (2) reputation of the alleged occupants, (3) reports of investigators that the premises sought to be searched appear to be deserted, and (4) that telephone calls to the premises reveal a reply from an occupant, are such facts sufficient to constitute probable cause for the issuance of a warrant to search the premises under the standards required

by the Fourth and Fourteenth Amendments to the United States Constitution?

6. Is the search warrant in this case, authorizing a search for "records, money and other bookmaking paraphernalia" so general in its descriptive terms as to offend the Fourth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FOURTEEN to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners were jointly indicted in the Superior Court of Fulton County, in the State of Georgia, for the offenses of operating a gaming house and betting on sporting events (R. 17), and the indictment was transferred to

the Criminal Court of Fulton County for trial (R. 16). After a trial before the Court without a jury, they were found guilty (R. 19) and each sentenced to serve sentences within the terms provided by State law (R. 12). A petition for certiorari was applied for in the Superior Court of Fulton County (R. 5), (this being the only method of review from this Court by Georgia law) and the writ was sanctioned (R. 10). After the trial judge answered the writ and admitted all issues and statements of fact (R. 247) the case came on for a hearing in the Superior Court of Fulton County, at which time it was overruled and denied without opinion (R. 250). An appeal was filed to the Georgia Court of Appeals (R. 1), and the judgment of the Superior Court was affirmed. (R. 260). Motion for rehearing was filed by petitioners (R. 261) and was denied by the Court of Appeals (R. 272). Application for certiorari was then made to the Supreme Court of Georgia (R. 274). This was denied (R. 275). A motion for reconsideration was then made to the Supreme Court of Georgia, and this motion for reconsideration was denied on July 21st, 1966. (See Supplemental Record.)

At the time of the trial of the case counsel for petitioners, hereinafter called defendants, objected to the introduction in evidence of an affidavit and search warrant (R. 26), insisting that the facts stated in the affidavit were insufficient on their face to constitute probable cause (R. 6), that the warrant was general in not particularly describing the articles to be seized as required by the Fourth Amendment and Fourteenth Amendment, that the warrant was void because it issued for articles not provided for by statute, that there was no finding of probable cause in the warrant, and that

there is no authority under Georgia statutes to authorize a search for records, money and other bookmaking paraphernalia described in the affidavit (R. 7). Counsel for defendants also objected to the introduction in evidence of the records seized by authority of the warrant on similar grounds (R. 7). The objections were overruled by the trial judge (R. 55), and the affidavit and warrant were admitted in evidence (R. 234-237).

During the trial of the case, and while the argument to the objection was being made by counsel for defendants, the case of Stanford versus State of Texas, decided by the Supreme Court of the United States on January 18, 1965 (379 U. S. 476), being a full bench decision written by Mr. Justice Stewart, was cited by counsel for defendants. After considerable colloquy between court and counsel, the trial judge reasoned thus: "There're some of these cases that would indicate that even though I differ with you that they ever intended to indicate, I attribute it to the loose language of uninformed men who live in an air castle, who are more bent on pursuing political ideas than they are giving objective reasoning to common, ordinary, horse-sense ruling. That's what I attribute it to. That they never meant to do that, and that when we read that language into it its more a reflection of the ignorance and the total separation of some of these judges of the higher levels from the reality of life in America, than it is their struggle to maintain liberty. It's a reflection of their ignorance, and I'm overruling this point of it" (R. 40). The entire colloquy between court and counsel appears from pages 27 through 55 of the record, dealing with the specific objections.

REASONS RELIED UPON FOR GRANTING WRIT OF CERTIORARI

1. The Georgia Court of Appeals, in relying upon the case of Gouled versus United States, 255 U.S. 298, misconstrued and misinterpreted the questions therein decided, and has thus permitted search warrants to issue for the seizure of articles not provided by law, but authorized at common law, even though the common-law did not in fact authorize their seizure.

2. The Georgia Court of Appeals has permitted a general search warrant to issue for the seizure of books and records not particularly described in the warrant, thus leaving to the discretion of the officer executing the warrant what articles or things should be seized.

3. The questions involved are of the utmost importance in the administration of justice by the States, and should be decided by the Supreme Court of the United States.

4. The trial judge and consequently the Georgia Court of Appeals has refused to recognize or apply the case of Stanford v. Texas, 379 U.S. 476, as applicable to a search warrant for the books and records in a gambling case.

ARGUMENT AMPLIFYING REASONS RELIED UPON

The Georgia Court of Appeals relied upon the case of Gouled v. United States, 255 U.S. 298, as authority for their holding that a Georgia judge, even though without statutory authority to issue a search warrant, is authorized by the common-law to issue it. Gouled makes no such ruling. In an obiter dicta statement the Supreme Court merely pointed out that there were instances where the judges of the early common law issued search warrants, just as they issued *general* search warrants and *writs of assistance*. However, such general search warrants and writs of assistance were the very reasons and foundations for the passage of the Fourth Amendment; to make sure that they would not be issued any more.

The trial judge absolutely refused to apply the provisions of Stanford, steadfastly holding to the view that the ruling was *wrong* and at no rate should it be applied in a gambling case. On the other hand, the petitioners in certiorari maintain that the Stanford case shuts the door to the issuance of search warrants which authorize the executing officer to use his judgment and discretion as to what articles or things he is to seize. This is a matter to be left to the magistrate issuing the warrant. His determination should not be substituted by the officer engaged in executing the warrant.

Certiorari should be granted in this case, and the Court should give full opportunity to go into these questions in order that the law may be fully settled.

Furthermore, the underlying facts of the affidavit are insufficient on their face to constitute probable cause for the issuance of the warrant, and, as a further fact, the

judge issuing the warrant did not find probable cause to have existed. The warrant merely states "sufficient cause" for the issuance of the warrant, and such finding does not comport with the plain language of the Fourth Amendment requiring "probable cause."

"Sufficient cause" as used by the judge in issuing the warrant may or may not have been probable cause, and, since the facts upon which the warrant was predicated do not import probable cause on their face, the warrant should be declared void.

APPENDIX

(a) Attached hereto is a copy of the judgment and opinion of the Court of Appeals in its entirety.

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At the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglar's tools and weapons, implements of gambling, and many other things of like character might be searched for in home or office, and, if found, might be seized under search warrants lawfully applied for, issued and executed.

Ellenburg and others were indicted for gambling by soliciting bets and wagers on the results of football games. On the trial of the case evidence was offered as to the seizure of "flash paper" with which papers on a desk were ignited by the defendants, together with sheets of paper showing odds on football games and lists of wagers accepted, cash, a pill, utility bills, 2 portable radios, a lighter, and federal wagering tax forms. Following conviction, the defendants certioraried the case to the Superior Court of Fulton County, contending that the search warrant, by means of which peace officers entered the premises, was void because executed for an unauthorized purpose. The warrant directed the peace officers to search the premises for "records, money, and other bookmaking paraphernalia described in the affidavit" in support of the criminal charge. The affidavit, signed by an assistant to the Solicitor General, recited the method of soliciting bets on athletic contests, that defendants were operating a bookmaking establishment on the premises and had concealed therein certain paraphernalia including records and bets, names of bettors and amounts and financial records showing the status of the bookmaking business, together with flash paper to be used in destroy-

ing records and large sums of money representing wagers. The denial of the petition for certiorari is the basis of this appeal.

HALL, Judge. "A search warrant may be issued only for the making of a search authorized at common law or by statute." Johnson v. State, 111 Ga. App. 298, 302 (SE2d). Prior to the Search and Seizure Act of 1966, Ga. L. 1966, p. 567, there was no statute expressly authorizing the issuance of a search warrant for the implements of gambling. The common-law of Georgia is "the Common Law of England, and such of the Statute Laws as were usually in force before the Revolution, with the following limitations" — the prohibitions of the Constitution of the United States, the Georgia Constitution and the statutes of this state. Flint River Steamboat Co. v. Foster, 5 Ga. 194 (5) (SE).

The defendants contend that at the time of the Revolution the law did not authorize the issuance of a search warrant for gambling implements. We disagree. A unanimous opinion of the Supreme Court of the United States provides: ". . . at the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglar's tools and weapons, implements of gambling, and many other things of like character might be searched for in home or office, and, if found, might be seized under search warrants lawfully applied for, issued and executed." Gouled v. United States, 255 U. S. 298, 308; 79 C. J. S. 827, §64, n. 89. The basic reason the law allowed the issuance of these warrants was that ". . . the citizen was for some reason not entitled to possess the property." Kaplan, Search and Seizure: A No-Man's Land in the

Criminal Law, 49 Calif. L. Rev. 474, 475. See also 2 Hale, Pleas of the Crown, 149 (Stokes and Ingersoll ed. 1847). Accord Kneeland v. Connally, 70 Ga. 424 (SE); Smoot v. State, 160 Ga. 744 (SE); Heath Sales Co., Inc. v. Bloodworth, 221 Ga. 567 (SE). The Supreme Court of New Jersey has held that the authority to issue this type of warrant ". . . is implicit in the judicial power." Eleuteri v. Richman, 26 N.J. 508 (141 A. 2d 46); State v. Macri, 39 N. J. 250 (188 A. 2d 389). This power has been exercised by our Georgia Courts for almost two hundred years.

The decision in Mapp v. Ohio, 367 U. S. 643, imposes no constitutional problem. In a later case, Ker v. California, 374 U. S. 23, the Supreme Court was more explicit as to the Mapp doctrine and federal-state relations. That Court stated that there was to be no assumption by it of "supervisory authority over state courts," nor did Mapp imply "total obliteration of state laws relating to arrests and seizures in favor of federal law." Both federal and state systems can take their own approach so long as each respects the same "fundamental criteria." From the above, it would seem that the Supreme Court is not concerned with whether a search warrant is issued pursuant to statute or the common law authority of the state judiciary. The phrase "fundamental criteria" is concerned with whether the warrant was issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (Constitution of the United States, Amendment IV), and whether it was executed in a reasonable manner.

Judgment affirmed.

Nichols, P. J., and Deen, J., concur.

COURT OF APPEALS OF THE STATE OF GEORGIA

Atlanta, April 18, 1966.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

J. L. Ellenburg et al v. The State

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Nichols, P. J., Hall and Deen, JJ., concur.

Bill of cost, $30.00.